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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 531

EARL P. COOK, *Appellant*

vs.

BEN W. FORTSON, JR., *as the duly appointed, qualified, and acting Secretary of State of the State of Georgia;*

J. LON DUCKWORTH, *Chairman of the Democratic Executive Committee of the State of Georgia;*

GRACE CANNINGTON, *Secretary of the Democratic Executive Committee of the State of Georgia; and the*

DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA, *an unincorporated association,*

Appellees.

PETITION FOR REHEARING

To the Supreme Court of the United States:

Now comes EARL P. COOK, and files this his Petition for Rehearing in the above-numbered case, pursuant to Rule 33 of the Court, and for cause, and in support thereof, respectfully shows to the Court as follows:

THE COURT ERRED IN DISMISSING THE APPEAL ON THE GROUND THAT THE ISSUES WERE MOOT.

The Per Curiam order entered herein must be read in the light of the Per Curiam order cited therein, viz,

> UNITED STATES v. ANCHOR COAL COMPANY, 279 U.S. 812.

The pertinent language from the cited case follows:

> "These appeals have been fully argued and considered, but in the present situation we find that they present moot issues and that further proceedings on the merits can neither be had here nor in the court of first instance. . . . the controversy involved has become moot and, therefore, is no longer a subject for appropriate judicial action."

In so holding in the instant case, Petitioner respectfully insists that this Court has committed grievous error.

> "Upon this point a page of history is worth a volume of logic."
>
> Mr. Justice Holmes, in NEW YORK TRUST CO. v. Eisner, 256 U.S. 345, 349.

It should be kept in mind that the fundamental controversy involved in the case at bar is as to whether the "county unit system" of counting votes is constitutional or not, as applied to Congressional elections.

On authority of

> MILLS v. GREEN, 159 U.S. 651;
>
> LORD v. VEAZIE, 8 How. 251; and

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AMERICAN WOOD PAPER CO. v. HEFT,
131 U.S. xcii,

Petitioner prays leave of the Court to submit extrinsic evidence which will show that, since the appeal in the instant case was docketed in this Court on September 23, 1946, and since October 28, 1946, when this Court held that the controversy was moot, several important events have transpired, and "judicial action" has been taken, all designed to deprive Petitioner and the class he represents of the rights asserted by him in the instant case.

As a background for such a showing, Petitioner requests the Court to keep in mind the following excerpts from the opinion of the District Court in this action. (See STATEMENT AS TO JURISDICTION, herein, *Appendix*, p. 10, et seq.):

> "It (the answer) set up, too, that on a contest the Contest Committee of the Democratic Executive Committee has decided that both the leading candidates should be certified to the Secretary of State as the Democratic nominees and this had in fact been done. . . . It was alleged that there was confusion as to who rightly constituted the Fifth District Congressional Committee, and this was the reason for deciding that both names should go on the ballot as Democratic nominees; and that an appeal is now awaiting action of the State Democratic Convention in October; and that because of the confusion it is better to leave the matter alone. The Secretary of State has already distributed to the Ordinaries of the counties of the Fifth District to be printed forms of ballots bearing the names of both nominees. . . ."
>
> ". . . The facts above stated are found to be true."

Conclusions of Law.

> " . . . But at last as matters now stand, the county unit rule is not being applied by anyone. The State Executive Committee has refused to apply it and has certified both candidates, and both are on the ballots which

are being printed, and every Democrat is free to vote for his choice and the popular vote will determine in the general election. The plaintiff and those he represents will get exactly what they claim they should have. The double certification is in effect a cancellation of the primary, as respects these two candidates. We cannot speculate on what the State Convention may do in October. At present we see nothing that ought to be enjoined, even if that remedy be available in such a case as this."

Since that opinion was written, and since this appeal was docketed in this Court, the following events have transpired, and the following judicial action has been taken:

1. On October 9, 1946, the State Democratic Convention took action upon the appeal of candidate James C. Davis, from the ruling of the Contest Committee naming both himself and Helen Douglas Mankin as candidates of the Democratic Party, and held that James C. Davis was the sole nominee of said Party for Congress, from the Fifth District of Georgia.

2. On October 12, 1946, notice of the action of the Convention was given to Ben W. Fortson, Jr., as Secretary of State of Georgia (Respondent herein), and demand was made upon him, by the authorities of said Party, that he certify to the Ordinaries in said Fifth District, the name of James C. Davis as the sole nominee of said Party for said seat in Congress. Said demand was refused.

3. On October 14, 1946, said James C. Davis filed his petition for mandamus against said Secretary of State, in the Superior Court of Fulton County, Georgia, seeking a mandamus absolute to compel said Secretary of State of Georgia to determine the issue as between said Helen Douglas Mankin and said James C. Davis as to who was the rightful nominee of the Democratic Party for said office, in the General Election to be held November 5, 1946, and to make certification thereof as required by law, to the Ordinaries in said District.

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After the Per Curiam Order entered herein on October 28, 1946, ordering the dismissal of the appeal on the ground that the issues were moot, the following "judicial action" occurred in the State of Georgia:

1. On October 28, 1946, the Superior Court of Fulton County, Georgia, in the mandamus proceeding above mentioned, granted a mandamus absolute against said Secretary of State of Georgia (Respondent herein), commanding him to determine the issue as between said Helen Douglas Mankin and James C. Davis, as to who was the rightful nominee of the Democratic Party for the United States House of Representatives from the Fifth Congressional District of Georgia in the General Election to be held November 5, 1946, and to make certification thereof as required by law to the Ordinaries of DeKalb, Fulton, and Rockdale Counties.

2. On October 30, 1946, the Supreme Court of the State of Georgia declined to grant a supersedeas staying said mandamus absolute, on the ground that the case *would become* moot before that Court could decide it.

3. On November 1, 1946, Ben W. Fortson, Jr., as Secretary of State of Georgia (Respondent heren), pursuant to the command of said mandamus absolute, determined the issue as between said candidates, and certified to the aforementioned Ordinaries, as the sole and rightful candidate of said Party in said election, the name of Candidate James C. Davis, who received a *minority* of the votes cast in said primary election, but who received a *majority* of the "county unit" votes.

4. Thereafter, the ballots for use in said general election were printed, and the voting machines set up, without the name of Helen Douglas Mankin appearing thereon as a candidate.

5. In the general election of November 5, 1946, Helen Douglas received a minority vote (by write-ins) against a majority vote for James C. Davis, according to published returns.

By extrinsic evidence, Petitioner would show, further, that

the effect of the aforementioned mandamus absolute was to require the Secretary of State of Georgia to choose the Member of the House of Representatives from the Fifth Congressional District of Georgia (there being no other candidate on the official ballot, and Democratic nomination in Georgia being equivalent to election), whereas, the Constitution (Article I, Section II, Clause i) provides that:

> "The House of Representatives shall be composed of Members chosen every second Year by the People. . . ."

Whereupon, Petitioner prays leave to offer proof thereof.

Under the circumstances, Petitioner finds himself in this peculiar situation:

> On October 28, 1946, his appeal was dismissed because, in the language of U. S. v. ANCHOR COAL CO., *supra*, which the Court must have intended to adopt, ". . . the controversy has become moot and, therefore, is no longer a subject appropriate for judicial action." It was too late, therefore, if said order be adhered to, for this Court to issue a Declaratory Judgment, holding that the "county unit" system is unconstitutional.
>
> Since that date, however (as has been stated, and as will be proven upon permission granted), Petitioner has, by "judicial action" in the State of Georgia, been deprived of the last vestige of his Constitutional right to choose his representative in the Congress.

"It may be," as said by Mr. Justice Rutledge in his dissenting opinion herein, "that the orders now in appeal have become moot in part because actions in execution of the challenged Georgia laws which appellants sought to have restrained have now taken place." But, as it pointed out, ". . . declaratory relief, appropriate in many instances where aid by way of injunction cannot be afforded, is sought."

cf. LOVE v. GRIFFETH, 266 U.S. 32, 34.

It is interesting to note that even Appellees have not contended that the controversy is moot as to the declaratory relief sought. Simply, they rely upon the proposition that

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> "The declaratory relief prayed for cannot be granted, because the case is not one appropriate for the grant of equitable relief."
>
> (See Pars. 4, 5, of STATEMENT BY APPELLEES OF MATTERS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED SATES, and MOTION TO DISMISS OR AFFIRM, p. 6.)

Evidently, the Court reached its conclusion *sua sponte*. And, in refusing to note "probable jurisdiction," it is respectfully submitted that the Court actually and legally assumed and exercised jurisdiction by adopting the language in U. S. v. ANCHOR COAL CO., *supra*, that

> ". . . the controversy involved has become moot, and, therefore, is *no longer* a subject appropriate for judicial action."

Without laboring the point, Petitioner insists that if the controversy is "*no longer* a subject appropriate for judicial action," obviously at one stage of the proceedings it was. There exists, then, no question of jurisdiction in the technical sense, and it is respectfully insisted that there is nothing in the record which was before the Court on October 28, 1946, which would indicate that the controversy as to declaratory relief was moot.

In view of the decisions in

MILLS v. GREEN, *supra*,

LORD v. VEAZIE, *supra*, and

AMERICAN WOOD PAPER CO. v. HEFT, *supra*,

it would appear that the question as to whether or not a controversy is moot is one of fact, since, in those cases, the fact was proven by extrinsic evidence. As yet, the only facts before the Court are set forth in an abridgment of the pleadings in the cause in the opinion of the Distrct Court below. Upon those facts, the trial Court found:

> "At present we see nothing that ought to be enjoined, even if that remedy be available in such a case as this."

THE COURT IS NOT REQUESTED TO JUDGE AN ELECTION, BUT TO PASS UPON THE CONSTITUTIONALITY OF THE ELECTION MACHINERY.

It is quite true that, under the Constitution (Article I, Section V, Clause 1):

> "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . ."

Likewise, it is true, however, that:

> "The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution. . . ." (Article I, Section II, Clause 1.)

As was said in

McPHERSON v. BLACKER,

146 U.S. 1, 23:

> "But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws, and its validity was sustained."

It is respectfully submitted that this Court has the "judicial power," the right, and the duty, to declare whether or not the laws of Georgia and the rules of the Democratic Party adopted by virtue thereof, imposing the "county unit" rule in Congressional primary elections, are Constitutional. Its jurisdiction was invoked in advance of the General Election, and before the name of any candidate finally was certified to the ballot for use in such election.

If, hereafter, the House of Representatives is called upon to judge of the election of its Member from the Fifth Congressional District of Georgia, it should be entitled to know whether the election machinery set up by and under the laws of the State of Georgia, is constitutional or not. Let this Court judge of the validity of the laws, and the House judge of the election, in the light of the Court's judgment.

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Under the decision of the Fifth Circuit Court of Appeals in

CHAPMAN v. KING,

154 F. (2d) 460 (Cert. denied),

a Democratic primary election is, beyond question, a part of the "public election machinery" of the State of Georgia.

As was said of such a primary in

U. S. v. CLASSIC,

313 U.S. 299, 314:

> "Interference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus, as a matter of law and in fact, an interference wth the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district. The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman. The right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice."

If the imposition of the "county unit" system in the Congressional primary of July 17, 1946, was State action, it was unconstitutional.

If the "county unit" system, so imposed, was unconstitutional, as alleged, then Petitioner and the members of his class have been deprived of their vote

> ". . . at the only stage of the election procedure when their choice is of significance. . . ."

If the primary be

> ". . . at the only stage of the election procedure when their choice is of significance,"

then the General Election was purely formal and of slight, if any, legal significance.

To require the House of Representatives, as the judge of an election, to look past the General Election, and past the Democratic Primary, and to decide upon the Constitutionality of the "election machinery" provided by the State of Georgia, is to impose upon it, or surrender to it, the duty which was placed upon this Court by the Constitution, and to invite and require the House to invade the jurisdiction and the proper sphere of action of this honorable Court.

Petitioner respectfully concludes that he has been illegally deprived of his Constitutional right to vote for a member of Congress from his district on a basis substantially equal to every other voter in the District. By a per curiam order, with three Justices dissenting, this Honorable Court has summarily dismissed the direct appeal to this court authorized by statute, and seeking to right this wrong. Such dismissal has been ordered without hearing or argument, on preliminary consideration of an abridged statement or outline of the case in the Jurisdictional Statement required under Rule 12, and a motion by appellees to dismiss or affirm, to which petitioner filed a short reply. Petitioner files herewith, and in support of this petition, his further brief and argument covering the full merits of the case, and respectfully asks the Court to consider same, to the end that the living character, gravity and merit of the case may be disclosed to the Court.

WHEREFORE, Petitioner respectfully moves this Court, by appropriate action, to withdraw its Per Curiam order entered herein on October 28, 1946, declaring the controversy to be moot; that the Court formally note jurisdiction, and that this important case be heard and considered upon its merits.

ALEX. W. SMITH,

CROOM PARTRIDGE,

Counsel for Appellant-Petitioner.

We, Alex. W. Smith and Croom Partridge, counsel for the above-named Appellant-Petitioner, do hereby certify that the statements of fact made in the foregoing petition for rehearing of this cause are true and that the petition is presented in good faith and not for delay.

ALEX. W. SMITH,

CROOM PARTRIDGE,

Counsel for Appellant-Petitioner.

Atlanta, Georgia.